
(1941) 09 MAD CK 0020
In the Madras High Court

Tatavarthi Nagaportharow

APPELLANT

Vs

Pulipati Subbarow and Others

RESPONDENT

Date of Decision : 05-09-1941

Acts Referred:

Citation : AIR 1942 Mad 360 : (1942) 55 LW 101 : (1942) 1 MLJ 177

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—This appeal arises out of an application filed under S.. 4 of the Provincial Insolvency Act in the insolvency of one

Mallayya by the 1st respondent who is a creditor of the said Mallayya. The relief sought is a declaration that the decree in O.S. No. 149 of 1932

on the file of the district Munsif 's Court, Masulipatam, obtained by the appellant against the insolvent Mallayya and his sons, respondents 5 and 6

in this appeal, is a nullity in its entirety and does not bind the Official Receiver, Kistna who is the 2nd respondent here. It was alleged in the

application that the said Mallayya was adjudicated insolvent on 20th January, 1932, that the appellant instituted the said suit subsequently without

obtaining the leave of the Insolvent Court and obtained a decree against the insolvent personally and against the joint family property in the hands

of his sons. The appellant stated in his affidavit that he was not aware of any insolvency when he filed the suit and that in any event the decree could

not be set aside in its entirety and if at all, it could only be declared a nullity against the insolvent and not against his sons. The learned District Judge

passed an order that he did not deem it necessary to decide the question u/s 4 (3) of the Provincial Insolvency Act and closed the petition with the

remark that the Official Receiver might proceed against any saleable interest the insolvent might have got in the son's shares. An appeal was

presented against this order and our learned brothers King and Krishnaswami Aiyangar, JJ., remanded the petition for hearing in the light of the

following observations contained in their order:

We consider the essential question which now requires adjudication is, what is the property which the Official Receiver is entitled to sell?

On remand the learned District Judge came to the conclusion: that the suit filed against the father and the sons without the leave of the Insolvent

Court was incompetent and therefore the decree was a nullity. He summed up his conclusion thus:

The question formulated by the High Court is answered by declaring that the Official Receiver is entitled to sell the father's share and also the

sons' shares for the reasons that the decree obtained in O.S. No. 149 of 1932, on the file of the District Munsif's Court, Masulipatam, is a nullity

in its entirety as having been obtained on a suit filed without previous leave of the Insolvency Court to proceed against the insolvent or his property,

the latter term including also the insolvent father's right to dispose of his, sons' shares.

It is against this decision this appeal has been preferred.

2. The question for decision is whether it is open to the Insolvent Court to declare u/s 4 of the Act that the decree obtained by the appellant is a

nullity in its entirety. It is not disputed that the Insolvent Court may give a declaration that the decree is not binding so far as the Official Receiver is

concerned as representing the insolvent, but can it also make such a declaration in regard to the decree obtained against his sons? From a perusal

of the plaint and the decree in this, case it is clear that the debt on which the decree was obtained was not a personal debt of the insolvent but a

debt incurred by him as the manager for the benefit of the family consisting of himself and his undivided sons, respondents 5 and 6. The debt was

therefore as much a debt of the sons as that of the father. It is also undoubted law that by reason of the insolvency of the father the shares of the

sons do not vest in the Official Receiver but what vests in him is the right of the father to sell the son's share for the discharge of such debts as

would be binding against the sons. Recently the question arose in Murali Mohan

Reddi v. Brahmayya (1943) 1 M.L.J. 173 whether leave of the

Insolvent Court is necessary to file a suit against the* undivided sons of a father who was adjudicated insolvent in respect of a debt incurred by the

father for the benefit of the joint family and it was there held that it was not necessary to do so. After hearing learned Counsel in this case, we see

no reason to take a different view. If it was not open to the Official Receiver to question the decree on that ground, could the Insolvent Court

make such a declaration? It was open to the sons to say that the suit would not be competent because leave of the Insolvent Court had not been

obtained against the father and if the suit could not be proceeded against the father, it could not be proceeded against them as well. But if no such

objection was taken by the sons on that ground" and they submit to a decree being passed, we do not see how it is open to the Official Receiver

to take any exception in regard thereto. The sons have till to day not chosen to set aside the decree passed against them and as the decree now

stands, it has become final as against them. The insolvency of the father does not prevent the sons alienating their shares and we have observed that

it does not prevent a creditor from filing a suit as against them. But what is contended by Mr. Kameswara Rao, the learned Counsel for the

respondent is that if the decree is not declared a nullity as against the sons, the appellant would proceed against the" sons" shares and appropriate

the sale proceeds for himself and no creditor of the insolvent is entitled to do so because the sale proceeds of the sons" shares would be property

which ought to be made available for the father's creditors and the right to sell, which was in the father before the insolvency and vested in the

Official Receiver on insolvency, would be lost. What we are called upon to decide in this case is whether the decree is a nullity even against the

sons, and if so, whether the creditor would be entitled to bring the son's shares to sale in execution of his decree. This is how we understand the

remand order of our learned brothers King and Krishnaswami Aiyangar, JJ. If the decree in so far as it is against the sons cannot be declared a

nullity in this proceeding, the further question does not arise for decision.

3. What remedies would be open to the Official Receiver in regard to the validity of any sale effected in execution of such a decree or to prevent

the creditor from appropriating the sale proceeds of the property sold in

execution of the decree for him-self are matters on which we refrain from expressing any opinion. The question of competency of a suit as against the sons without the father being impleaded as a party or of his being; impleaded without leave of the Insolvent Court is a matter entirely for the sons and if a decree has been obtained against them without protest it is not open to third parties including the Official Receiver to challenge the validity of the decree obtained in such a suit in view of the fact that leave of the Insolvent Court is not necessary for filing a suit against the sons.

4. In the result we modify the order of the learned District Judge by declaring that the decree obtained by the creditor is not binding on the Official Receiver in so far as the insolvent Mallayya is concerned. The 1st respondent will pay the costs of the appellant here and in the Court below.